

# Giving Evidence Policy

## Essential Summary

The *Giving Evidence Policy* outlines a Youth Justice NSW (YJNSW) employee's responsibilities when requested or subpoenaed to provide evidence to the court, police or legal representatives by way of a statement, affidavit or in person or the production of documents or records.

YJNSW employees requested by the Department of Community and Justice Legal (DCJ Legal) or Crown Solicitor's Office (CSO) to give evidence in court are encouraged to comply with the request and seek support from their supervisor. They should also request legal advice and support from DCJ Legal if asked to provide an affidavit or statement.

In addition to requests to give evidence, YJNSW employees can also be subpoenaed to provide evidence or attend court.

This policy provides information on producing evidence when requested by authorities. It outlines the importance of accurate record-keeping and decision-making, and YJNSW employee's possible role as a witness.

*Printed or saved copies of this document may not be up to date.*

*Please check in the [Operations Manual \(TOM\)](#) to ensure you have the latest version before using this document.*

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# 1 Scope

This policy applies to YJNSW employees ('employees'), who during their duties are required to give or produce evidence. This policy does not relate to YJNSW employees who are required to submit court reports as a form of evidence. For information specific to court reports refer to the *Court Communication Policy*.

# 2 Purpose

The purpose of this policy is to:

- explain the rights and responsibilities of employees when giving evidence to the court
- describe the importance of accurate record keeping and secure information sharing
- outline the legislative requirements for providing evidence
- provide information on the evidence request process
- advise on preparing an affidavit and/or statement
- identify the legal support available to employees who are asked to provide evidence
- mitigate litigation risk by providing employees with guidance on providing evidence.

# 3 Definitions

**Affidavit:** a written statement of evidence which has been sworn or affirmed to be true before a qualified witness (for example, a Justice of the Peace or a solicitor) in compliance with the rules of evidence.

**Document:** anything on which there is writing, marks, figures, symbols or perforations, braille or shorthand documents, and digital documentation. This includes images, sounds, maps, plans, drawings and photographs and draft documentation.

**Evidence:** any information pertaining to young people or an incident or event that could rationally affect the assessment of a fact

**Must:** indicates a mandatory action to be complied with

**Public Interest Immunity:** when production of a relevant and admissible document is not ordered by the court as it would be harmful to the public interest<sup>1</sup>.

**Should:** includes a recommendation action to be complied with unless there are sound reasons for taking a different course of action

**Subpoena:** is a court order legally requiring the giving of evidence, the production of documents, or both<sup>2</sup>.

**Witness:** an employee who has seen or has information about an event or issues that the court is deciding about.

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<sup>1</sup> Australian Law Reform Commission (2019) *Evidence excluded in the public interest* retrieved from: <https://www.alrc.gov.au/publications/15.%20Privilege%3A%20Other%20Privileges/evidence-excluded-public-interest>

<sup>2</sup> National Archives of Australia (2019) *Compliance with summons, subpoenas and orders of discovery* retrieved from: <http://www.naa.gov.au/information-management/information-governance/evidence/subpoenas-discovery-orders/index.aspx>

**Witness Statement:** a written statement of evidence which is signed but not sworn and does not need to be witnessed by a qualified witness. It cannot be read as evidence in Court as an affidavit could be.

**YJNSW Employee ('employee')**: refers to people employed by YJNSW on a permanent, temporary or casual basis.

## 4 Types of evidence

Employees can be asked to provide information to the court as part of their normal duties. Advice on providing information to the court about young people is also found in *The Court Report Procedure* and *Court Communication Policy*. Employees can be asked to provide evidence by giving a statement, affidavit or formal attendance at court.

Most information collected by an organisation can be considered as evidence, but in a YJNSW context this could include information about young people, other employees and/or persons external to YJNSW.

Witnesses are only permitted to give evidence of observations they have personally made; what they saw, heard or otherwise experienced. Anything other than this direct evidence is hearsay and will not be admissible in Court. There are exceptions to the hearsay rule and these include business records and contemporaneous notes. Where possible, the best evidence should be used.

In the YJNSW context, the best source of admissible evidence includes, but is not limited to;

- a verbal account
- recorded justifications for decision-making
- case notes (CIMS)
- photographs
- reports i.e. background reports, breach reports, incident reports
- diaries
- emails
- log books
- search registers
- program worksheets
- risk assessments, field work tracking records and local safety procedures
- Psychological / behavioural assessments

### 4.1 Requests to give evidence to police and legal representatives

Employees must provide as much information as possible when asked by police to make a verbal statement relating to any offence alleged to have been committed by a young person.

Employees must supply police with the records if requested by police, for information relating to a young person under a current supervision or control order. If police seek records relating to a past client, then they must produce a search warrant or subpoena prior to any employee providing the requested records.

Prior to providing police with any written records, making a statement or appearing in court, employees must advise their Centre or Area Manager of the request before taking any action.

Where a legal representative directly contacts a YJNSW employee for information regarding a young person, they are to refer their enquiry to the FACS Legal inbox at [FACS.LegalInbox@facs.nsw.gov.au](mailto:FACS.LegalInbox@facs.nsw.gov.au).

## 4.2 Requests to provide evidence to the courts

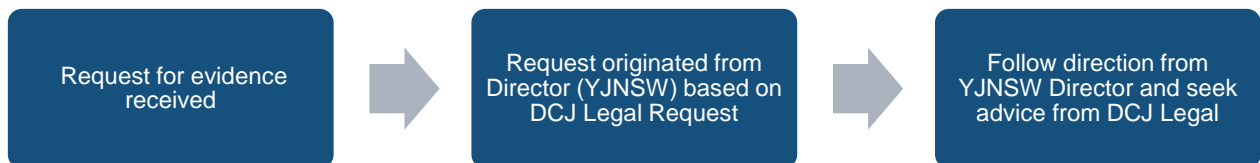
For many employees such as Court Intake workers and caseworkers, giving evidence in court can be a routine part of their role responsibilities. The court or the parties involved in legal proceedings may also notify an employee of a specific request to provide evidence. If this is not a part of their responsibility, then providing evidence is voluntary. However, if subpoenaed to attend court and give evidence, the employee is legally obligated to comply. Refusing to comply with a voluntary request to provide evidence may result in employees being subpoenaed to attend court.

Employees may be required under the *Children (Detention Centres) Act 1987* to appear before the Children's Court to give evidence or produce a document. An employee may also be required to attend other courts and tribunals in other proceedings and give evidence or produce a document.

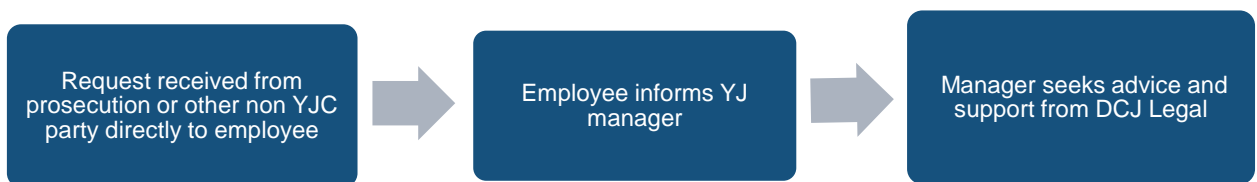
In most cases, the notification to attend court and give evidence or produce documents will set out the attendance requirements including the hearing date and/or the documents to be produced. Employees must confirm the hearing date, time and location so they can seek support, review records and be prepared.

The following charts shows the ways in which an employee will be notified if they are required to give evidence, what actions are required and the support available to provide advice:

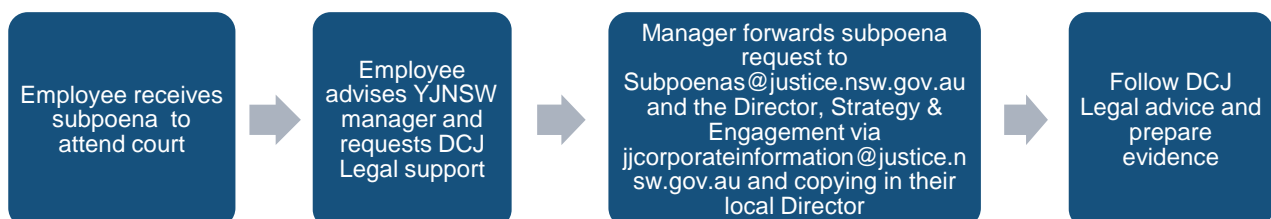
### 1. A request for evidence is received from a YJNSW Director, DCJ Legal or Crown Solicitors Office



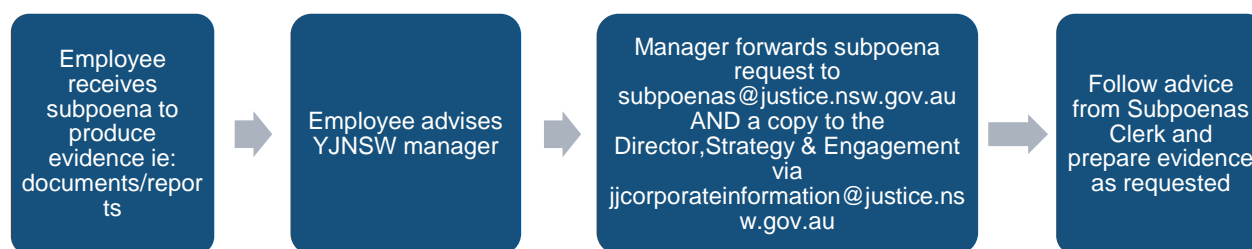
### 2. A request for evidence from the prosecution or other non-YJNSW authority to attend court to answer questions arising from a business record, affidavit or witness statement



### 3. Employee is directly subpoenaed to attend court



#### 4. Employee is directly subpoenaed to produce evidence



If requested to give evidence, employees should promptly seek the support of their Centre or Area Manager. Managers can seek advice from the Department of Communities and Justice Legal (DCJ Legal) to confirm the correct process for giving evidence is followed on (02) 8346 1388, or via email at [enquiries-generalcounsel@justice.nsw.gov.au](mailto:enquiries-generalcounsel@justice.nsw.gov.au).

Managers must also forward the subpoena to produce operational documents for processing to [Subpoenas@justice.nsw.gov.au](mailto:Subpoenas@justice.nsw.gov.au).

### 4.3 Subpoenas

A subpoena is a written order to provide documentation or attend court. It is served to the individual being called upon and can be issued by mail or in person.

Employees will be supported by YJNSW when they are responding to subpoenas. Support includes information within this policy, legal assistance from DCJ Legal, support from management and the e-Learning module, available on SuccessFactors by searching for 'Giving Evidence'

If subpoenaed, employees must seek support from their supervisor and, if necessary, engage DCJ Legal, who will assist in determining what evidence should be produced. All subpoena requests must also be emailed to the Director, Strategy and Engagement via [jjcorporateinformation@justice.nsw.gov.au](mailto:jjcorporateinformation@justice.nsw.gov.au).

### 4.4 Circumstances requiring YJNSW to produce evidence

There are a many reasons employees may be required to produce evidence, including:

- employees seeking compensation against YJNSW
- young people seeking compensation against YJNSW
- young people sustaining injuries or death
- employee injuries
- witnesses giving evidence about the detention environment
- witnesses providing evidence about community supervision
- conflicting information in written statements or affidavits that requires clarification in court
- decision-making that is being challenged

Information and record keeping relating to incidents may also be requested as evidence. The *Incident Management Policy Reporting, Debrief and Review Policy* outlines recording processes for incidents, as well as the record keeping requirements for documenting incidents.

## 4.5 Witnesses

Employees can be called to give evidence as a factual or expert witness.

Factual witnesses provide evidence relating to information and personal observation only, not personal opinions.

Expert witnesses are qualified in an area of expertise, with training or specialised knowledge in that area. Courts sometimes use expert witnesses to provide opinion evidence in an area of expertise. An example of an expert witness would be a YJNSW psychologist who is qualified to provide their expert opinion on the psychological state of a young person.

It is important for employees to understand what is expected from them as a witness and discuss this with their supervisor and DCJ Legal.

## 4.6 Providing evidence to the court

YJNSW employees can reduce the chance of their evidence being challenged in court by; keeping accurate records, making justified decisions and cooperating with notices to provide evidence.

### 4.6.1 Accurate record keeping;

All YJNSW documents should be viewed as potential evidence. Good record-keeping is a principle of effective YJNSW case management and operational decision making. The *Case Management Policy* outlines specific requirements for documenting case management activities. Information within YJNSW records must be

- accurate
- objective
- written in active voice
- verifiable
- contemporaneous (recorded at the time or shortly after the event occurred)

Accurate record keeping ensures that employees have the relevant documentation required if asked to produce evidence. Documents should be legible, reflect the situation to the best of the author's knowledge and be justified through objective observations and facts. *The Court Report Writing Manual* informs employees of the correct style and language for documentation.

### 4.6.2 Cooperating with notices to produce evidence (subpoenas, GIPAA applications and statutory orders)

Information held by the Department of Communities and Justice (DCJ) can be requested by members of the public under the *Government Information (Public Access) Act 2009 (GIPA Act)*. These requests are separate from a request for an employee to attend court and give evidence.

All such enquiries should be directed to the DCJ web pages [Access to Information](#) and [Subpoena, Summons, Statutory Notice or Order: requests for production](#) for further information, including how to submit a request. The Open Government Information and Privacy Unit (OGIP) process these requests and will liaise with Youth Justice as required.

For more information on the GIPAA process employees can also refer to [GIPAA, privacy and copyright policies and procedures](#) on the Justice Intranet.

## 4.7 Protecting confidential information

Information requested as evidence can be confidential or sensitive. DCJ Legal must be informed if any information could be harmful if disclosed, for example something likely to affect the administration of justice or personal safety.

Options to protect disclosure of information must be discussed with DCJ Legal.

Public Interest Immunity (PII) considers whether public interest could be harmed or injured if information is disclosed and DCJ Legal will support YJNSW employees in assessing this.

# 5 Preparing your evidence

## 5.1 Affidavits

If employees are asked to provide evidence via affidavit, they must speak to their manager who will get legal support from DCJ Legal.

Affidavits can be written with assistance from DCJ Legal but must be written in the employee's own words. After review by a legal representative, the employee must swear the affidavit with an authorised witness such as a solicitor, barrister or Justice of the Peace (JP).

## 5.2 Witness statements

Witness statements are like affidavits, but do not need to be sworn in or affirmed. This means employees may be required to attend court to speak about the facts in their witness statement. Employees should seek advice from DCJ Legal.

# 6 Giving evidence in court

Employees giving evidence in court should refer to the Giving Evidence in Court resource (Legal, Department of Communities and Justice) on The Operations Manual (TOM).

Employees may be questioned on their court reports, version of events and/or their prepared affidavit.

If cross examined on their evidence, employees can ask for questions posed to be repeated if it is difficult to understand or is multifaceted.

It is important that employees prepare for giving evidence as best as possible. Cross examination (by the opposing legal representative) may challenge an employee's credibility, memory or objectivity and employees should provide answers to the best of their knowledge and experience and without speculation or outside of their area of expertise.

The Prosecutor (or prosecuting agency) may want to go through the evidence with the employee before court. This can assist the employee to consider the questions they could be asked in court or clarify anything they do not understand about the process.

While less common, a YJNSW employee may be asked to provide evidence to a jury.

It is also important for employees to check on court dates and progress as this can change.

It is normal to feel nervous or worried about giving evidence in court. Employees are encouraged to seek support from their colleagues, managers, DCJ Legal and, Peer Support



Officers, where available. Employees can also access free, confidential support through the Employment Assistance Program (EAP).

## **6.1 False statements or representations**

Under s92 of the *Criminal Procedure Act 1986*, a written false or untrue statement is an offence. Providing a statement or recording of a statement containing any false or untrue information is also an offence. It is important to make statements as truthful and detailed as possible. Developing statements that are factual minimises the chances of being called into court to be challenged on controversial information.

## **6.2 Taking an oath or making an affirmation to tell the truth**

When giving evidence, the court officer requires witnesses in the witness box to take an oath to tell the truth or make an affirmation to do so. It is an offence to give false evidence in court after the affirmation or oath.

If other assistance is required i.e. sight assistance to read the oath or affirmation, or a holy book other than a bible, employees must notify whoever called them as a witness 24 hours prior to the court appearance for this assistance to be arranged.

# **7 References**

## **Legislation**

*Children (Detention Centres) Act 1987*  
*Children (Criminal Proceedings) Act 1987*  
*Evidence Act 1995*

## **Policy**

Case Management Policy  
Court Communication Policy  
Incident Management Policy, Reporting, Debrief and Review Policy  
Policy for Applying Powers and Responsibilities under the *Children (Detention Centres) Act 1987* and Regulation

## **Procedures**

Court Report Procedure

## **Resources**

Court Report Writing Manual  
Giving Evidence in Court information sheet – Legal, Department of Communities and Justice (TOM resource)

## 8 Document information

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<b>Title:</b>	Giving Evidence Policy
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## 9 Document history

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Version	Date	Reason for Amendment
1		New Policy developed

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